IN THE

eme Court of the United States.

OCTOBER TERM, 1899.

No. 303.

HE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.

vs.

POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

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or to the United States Circuit Court of Appeals Fourth District.

Appellant resisting Motion of Appellee to vacate he Supersedeas upon the Writ of Error from this Court."

STATEMENT OF CASE.

ne 11, 1898, the Postal Telegraph-Cable Company, called the Telegraph Company, a corporation char- der the laws of the State of New York, having accep- provisions of the Act of Congress, approved July 24, itled: "An act to aid in the construction of telegraph

and to secure to the government the use of the same for
l, military and other purposes," filed in the office of the
of the Superior Court of Guilford county, North Caro-
a petition making the Southern Railway Company, here-
er called the Railway Co., the sole defendant, in which
on the Telegraph Company asked the condemnation, for
irposes as a telegraph company, of a continuous right of
along, upon and over the lands (roadway) of the Railway
from a point on the State line between the States of North
lina and Virginia, where said railroad crosses the State
thence south through the counties of Rockingham, Guil-
Randolph, Davidson, Rowan, Cabarras, and Mecklenburg
harlotte, and from the town of Greensboro, in the county
uilford, to the city of Raleigh, passing through the coun-
of Guilford, Alamance, Orange, Durham and Wake, and
n amended petition filed the same day, asked for a like
lemnation from Greensboro, North Carolina, to Winston,
orsythe county, North Carolina—the whole distance being
ly two hundred and fifty miles, and the larger part of the
erty sought to be condemned being situated within the
tern District of North Carolina.

summons was issued requiring the Railway Co. to appear
re the clerk of the Superior Court of Guilford county on
22nd day of June, 1898, and answer.

n the 22nd of June, 1898, the Railway Co. entered a special
earance for that purpose, and filed a petition and bond,
he removal of the proceedings to the Circuit Court of the
ted States for the Western District of North Carolina.
on the same day, said petition and bond were presented to
State Court and application made to it by counsel for the
lway Co. to enter an order removing the cause to the Cir-
Court of the United States; but the State Court denied
application to remove, and made an order requiring the
lway Co. to answer. Thereupon, the Railway Co. procured
anscript of the record from the clerk of the State Court
filed the same in the clerk's office of the Circuit Court of
United States at Greensboro, N. C., on June 25th, 1898.

nt to June 22nd, 1898, the Telegraph Co. sought to
action in the State Court in said proceedings to
nd upon a bill filed by the Railway Co. in the Cir-
of the United States at Greensboro a restraining
ranted prohibiting further prosecution of the cause
Court.

graph Co. moved the Federal Court to remand said
to the State Court, and the Railway Co. moved
Court to continue the restraining order in force,
tion. These motions were argued at Asheville on
14th day of July, 1898, and, on the 20th of July,
urt filed its written opinion:

ng to remand the proceedings to condemn, to the

g that the restraining order must be continued in
the further order of the court.

8th day of August, 1898, the Telegraph Co. pre-
e Federal Court another petition, and asked leave
ame. The court continued this application until
1898, and required the Railway Co., by the date
to plead.

rences to proceedings, where not otherwise stated, are to the printed record.)

t 31, 1898, the Railway Co. filed its written motion
said petitions of the Telegraph Co., and each of
ing sixteen grounds therefor. See pp. 96 to 102
The motion to dismiss was overruled as to petition
Superior Court of Guilford county by order, p. 29,
dated August 31, 1898. See Bill of Exceptions,
pinion, pp. 31–41.

nber 15, 1898, the Circuit Court made an order by
ered that S. L. Trogdon, Esq., clerk of that court
ro, North Carolina, do appoint three disinterested
ent freeholders, resident in that district, and sum-
before him: that said persons so elected shall act
oners to assess the damages which the Southern

Railway Company may sustain by reason of the erection of the telegraph poles and the stretching of the wires thereon of the Postal Telegraph Cable Company, as proposed in the petition of said company: that said commissioners shall take before said clerk the oath prescribed in section 1946 of the Code of North Carolina, and shall proceed in all respects as required in said Code in assessing such damages, estimating and assessing such compensation as may be just for said Southern Railway Company by reason of the premises: that said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, over which meetings said clerk shall preside: that they take such testimony in respect to said damages to said Southern Railway Company as they may deem pertinent, not, however, extending their inquiry as to the benefit to be derived by the Telegraph Co., or the value thereof, to it: that the first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause: and that after hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, and sign and seal the same and file it with the clerk of said court at Greensboro. See pp. 42–43.

This order was made upon application of counsel for the Telegraph Co., without notice to or knowledge of counsel for the Railway Co. Immediately upon hearing of the order, counsel for the Railway Co. brought the matter to the attention of the court, and an order was made on September 23, 1898, suspending the order of September 15, 1898, and required the Telegraph Co. to show cause on October 7, 1898, why the Railway Co. should not be permitted to file its answer and have the order of September 15, 1898, vacated and annulled. See p. 47.

On October 7, 1898, the parties plaintiff and defendant, by their attorneys, appeared before the court, and the Railway Co. tendered and asked leave to file its answer. The court, over the written objection of the Telegraph Co. (pp. 64-66), announced its purpose to allow the Railway Co. to file said answer, which

will be found at pp. 48 to 64, and the Telegraph Co. demurred *orally* to said answer, but the order filing said answer and noting said demurrer was not made until October 24, 1898. See pp. 69–70.

The paper headed "Demurrer to Defendant's Answer," pp. 64–66, was itself the answer tendered by the Telegraph Co. pursuant to the order of September 23, 1898, requiring the Telegraph Co. to show cause. It was not the demurrer. The heading is erroneous. The oral demurrer to the answer of the Railway Co. was argued October 7, 1898, and the court took time to consider. On October 17, 1898, the court filed a written opinion sustaining this demurrer. See pp. 66–69.

On October 24, 1898, the court made an order filing the answer of the Railway Co., noting the demurrer of the Telegraph Co., and sustaining said demurrer. The Railway Co. then asked leave to introduce testimony sustaining the averments of its answer, but the court in said order overruled this motion and refused to permit the Railway Co. to introduce testimony. The court also reinstated its order of September 15, 1898. To all of which ruling the Railway Co. excepted. See order, pp. 69–70.

On October 24th, 1898, the court made also another order, stating in detail certain exceptions taken by the Railway Co. to certain of its rulings, which will be found at pp. 75–76. The same exceptions, together with others set out with greater particularity, will be found in the three bills of exceptions of the Railway Co., to be found respectively at p. 30, p. 45, and p. 73.

On October 24th, 1898, the Railway Co. asked for a writ of error and supersedeas to the order of October 24th, 1898, sustaining said demurrer, refusing to allow the introduction of testimony, reinstating its order of September 15th, 1898, and otherwise ordering as therein set forth. The application for a writ of error and supersedeas, on the motion of the Telegraph Co., was continued until November 4th, 1898. See order, pp. 88–89, erroneously headed "Order refusing Appeal." On November 4th, 1898, a petition for an appeal, together with an

assignment of errors, was presented to the court, and will be found on pp. 78 to 86 inclusive. On November 9th, 1898, the court filed an opinion and made two orders, one of which recites the facts last above stated, and the other refused the Railway Co. the writ of error prayed by it. See pp. 87, 88–90.

On November 29, 1898, the Circuit Court set aside the last mentioned order and allowed the writ of error and supersedeas as prayed in the assignment of errors theretofore filed. See pp. 95–96.

IN THE CIRCUIT COURT OF APPEALS.

On the 30th of March, 1899, the Circuit Court of Appeals filed an opinion holding that no appealable order had been made by the Circuit Court and, on March 31st, 1899, made an order dismissing the writ of error for want of jurisdiction.

The order allowing the present writ of error and supersedeas was made on May 4th, 1899, and the supersedeas bond, in the penalty of $5,000.00 with the Virginia Trust Company as security, was then taken and approved by Honorable Nathan Goff, Circuit Judge, who had, after full argument, allowed the writ of error from the Circuit Court to the Circuit Court of Appeals to operate as a supersedeas—had presided at the full and extended hearing in the latter court—had entered a subsequent order in the Circuit Court—who was cognizant of all subsequent action in the cause, and upon whose action, in making the order allowing a writ of error and supersedeas, taking and approving the supersedeas bond, and signing a citation and writ of error, intended to operate as a supersedeas, the Chief Justice of this Honorable Court based his action, in signing the present writ of error to operate as a supersedeas and approving the supersedeas bond, already approved by Honorable Nathan Goff, Circuit Judge, and signing the existing citation herein. The three last mentioned papers were duly filed in the Clerk's office of the Circuit Court of Appeals at Richmond, Virginia, on May 6th, 1899, together with copies of said writ of error and citation. A copy

of Judge Goff's said order of May 4th, 1899, and the original form of writ of error and citation signed by him are filed in the Clerk's office of this court.

IN THE SUPREME COURT OF THE UNITED STATES.

The record from the Circuit Court of Appeals reached the Clerk's office of this court Saturday, May 20th, 1899, and has not yet been printed, but the necessary fees were paid May 22, 1899, and the cause then docketed as No. 832, October Term, 1898. It now stands as No. 303, October Term, 1899.

On May 19, 1899, counsel for the Postal Telegraph-Cable Company caused to be served upon counsel for the Southern Railway Company the following notice (caption being here omitted), viz:

Motion by the Defendant in Error to Dismiss.

Now comes the defendant in error, The Postal Telegraph Cable-Company, by J. R. McIntosh, Counsel, and moves the court to dismiss the writ of error in this cause, (1) because this court has no jurisdiction of the same; (2) if the motion is not sustained, then, that the *supersedeas* upon the writ of error from this court be modified, so that during the pendency of the writ, it will not prevent or hinder the defendant in error from occupying the premises appropriated for its use and proceeding to erect and operate its line of telegraph thereon, pending said writ of error.

(Signed) J. R. McINTOSH,
Counsel for Motion.

On May 22, 1899, counsel for the appellant appeared and filed a printed brief respectfully submitting that the notice of said motion was illegal and unsufficient, and on the same day the appellee appeared by counsel before this Court, and—while submitting the above notice—withdrew its motion to dismiss the writ of error allowed appellant; but moved the court to vacate the supersedeas.

This honorable Court adjourned without action upon appellee's motion.

ARGUMENT.

Under the rulings of this court in *Bohannan* v. *Nebraska*, 118 U. S., 231, and other like cases, that "the court will not consider the merits of the question involved in a case on a motion to dismiss unaccompanied by a motion to affirm,"—we cannot in resisting appellee's motion to vacate the supersedeas awarded in this cause, discuss the merits of the controversy, *i. e.*, the fundamental proposition of appellant that there is no law in existence under which a telegraph company may, in North Carolina, condemn a right of way for its purposes upon the strip of land constituting the roadway of a railroad: the contention of appellant that, by legislation subsequent to the adoption of the Code of North Corolina of 1883, the legislature of that State has repealed (as to telegraph condemnations) the statute under which appellee founds its application to condemn the property of appellant. These with many other vital questions going to the merits of the controversy, presented in the assignment of errors, must await a hearing upon the merits. Appellee's counsel will endeavor to avoid violation of the rule announced in *Bohannan* v. *Nebraska*, 118 U. S., 231; but, in resisting appellee's motion to vacate the above supersedeas, it will be necessary to analyze the orders of the Circuit Court rendered September 15, 1898, and October 24, 1898, and show what they determine upon their face, in order to demonstrate appellant's contention that the order of October 24, 1898, was a final order and that a supersedeas properly followed a writ of error thereto. The orders of September 15, 1898, and October 24, 1898, are as follows:

Order of September 15, 1898.

"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him. That the said persons so selected shall act as commissioners to assess the damages which the Southern Railway Company may sustain by reason of the erection of

telegraph poles and the stretching of the wires thereon of Postal Telegraph-Cable Company, as proposed in the peti- of said Company to this court. That the said commis- ers shall take before the said clerk the oath prescribed in ion 1946 of the Code of North Carolina, and shall proceed ll respects as required in said Code in assessing such dam- s, estimating and assessing such compensation as may be for said Southern Railway Company by reason of the mises. The said commissioners shall hold their meetings he court-house of the United States, in the city of Greens- o, over which meetings said clerk shall preside, and they authorized and empowered to take such testimony in re- ct to the said damages to the said Southern Railway Com- y as they may deem pertinent, not, however, extending ir inquiry as to the benefit to be derived by the Telegraph , or the value thereof, to it. The first meeting of the com- ssioners, of which the said clerk shall give due notice to m and to the parties, shall be held ten days after notice of ir appointment has been served on the parties to this cause. After hearing the evidence and reaching their conclusion, said commissioners shall reduce their award to writing, l sign and seal the same and file it with the said clerk of this rt at Greensboro." See pp. 42–43.

Order of October 24, 1898.

This day came the defendant Railway Company and by ve of court filed its answer to the complainant's written notice l motion, to which said answer the plaintiff Telegraph mpany demurred, and after argument of counsel, and the tter being duly considered by the Court, said demurrer is reby sustained, and the defendant having asked leave to in- duce testimony sustaining the averments of its answer, which ve was refused by the court.

It is therefore ordered, that the former order made by this rt directing the clerk of this court, at Greensboro, North rolina, to appoint commissioners to assess the damages in e above entitled cause, is hereby reinstated; and the clerk of

this court is directed to fix a day not earlier than ten days after the entry of this order, for the meeting of said commissioners, to all of which action of the court, except leave of the court to the defendant to file its answer, the defendant excepts." See pp. 69–70, also pp. 73–76.

What this Order of October 24, Settled.

1. It sustained the demurrer of the Telegraph Co. to the answer of the Railway Co.

2. Refused permission to the Railway Co. to introduce testimony sustaining the averments of its answer.

3. Reinstated the order of September 15, 1898, directing its clerk at Greensboro to appoint commissioners to assess damages.

4. Directed Clerk Trogdon to appoint a day for the meeting of said commissioners.

Detailed Analysis of the Order of October 24.

It is respectfully submitted that this order of October 24, 1898, was a final order. By it the court—

1. Determines that North Carolina statutes are in force, under which the property of the Telegraph Co. can be condemned.

2. Proceeds in direct violation of these statutes, as construed by its own opinion in this cause.

3. Determines without proof the conditions precedent to condemnation under these statutes.

4. Refuses to hear proofs as required by section 1945 of the Code of North Carolina.

5. Determines, upon demurrer, that every defense set up in the answer of the Railway Co. is without merit, even though it were proved by conclusive evidence.

6. Determines that the Telegraph Co. may take possession and use the property of the Railway Co., without any further order of the court.

7. Determines that the entire condemnation may be made in one proceeding.

8. Prohibits testimony showing the value to the Telegraph

any for its purposes of the property sought to be con-
ed.

Delegates to its clerk the power of selecting and appoint-
isinterested freeholders to act as commissioners, and
rize him to preside over them.

Delegates to its clerk powers vested in the court and
ourt only.

n conceding that statutes are in force in North Carolina
, authorizing the condemnation of a railroad for the
uction of telegraph lines (which is earnestly denied) yet
n 2007 of the Code of that state requires that "such lines
egraph shall be so constructed and maintained as not to
ct or hinder the usual travel on such railroad."

Code of North Carolina Secs. 2007 & 2009.

. 2007. Telegraph lines, who may maintain. 1874–'5,
, s. 2.

y telegraph company chartered or incorporated by this or
ther state shall have the right to construct, maintain and
te lines of telegraph along any railroad or other public
ay in the State of North Carolina, but such lines of tele-
shall be so constructed and maintained as not to obstruct
der the usual travel on such railroad or other highway.

. 2009. Entitled to right of way upon just compensation.
'5, c. 203, s. 4.

h telegraph company shall be entitled to the right of way
he lands, privileges and easements of other persons and
rations, and the right to erect poles and establish offices,
making just compensation therefor.

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tion 1945 of said Code is the only statute which has at
me provided for the appointment of commissioners, and
statute requires *conditions precedent* to such appointment:
vides that all persons, whose estates or interests are to be
ed, may answer and show cause against the condemnation:
uires the court to hear the proofs and allegations of the

parties, in any and every event *before* appointing commissioners.

The full text of Section 1945 is as follows:

Code of North Carolina, Section 1945.

"*Allegations made against petition; Freeholders appointed to appraise estate.* 1871–2, c. 138, s. 15.

1945. "On presenting such petition to the Superior Court, as aforesaid, with proof of service of a copy thereof, and notice as aforesaid, all or any of the persons whose estates or interests are to be affected by the proceedings, may answer such petition and show cause against granting the prayer of the same, and may disprove any of the facts alleged in it. The court shall hear the proofs and allegations of the parties, and if no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested and competent freeholders, who reside in the county where the premises are to be appraised, for the purposes of the company, and shall fix the time and place for the first meeting of the commissioners."

In no event can a telegraphic right of way be condemned on a railroad unless it be shown that the proposed telegraph line will be so constructed "as not to obstruct or hinder the usual travel on such railroad," &c., s. 2007. The condemning corporation must file its petition. The railroad upon which the right of way is sought to be condemned then files its answer. The issue is thus made up. This section requires the court to hear the proofs, and if no sufficient cause be shown against the condemnation, to appoint commissioners. Observe, however, that the court itself must hear the proofs upon which issue is joined *before* the appointment of commissioners. The court itself must determine that the right to condemn *exists*. The court itself must determine that the proposed telegraph line will not obstruct ordinary travel nor hinder the usual travel on such railroad. In order to know whether or not the line will do this, the court must know the character and location of the line. These questions are, therefore, *jurisdictional*.

1945 of the Code of North Carolina was construed
rcuit Court in its opinion of September 9, 1898, record
). The court there recognized the right of defendants
r and to introduce proofs, and its duty to hear proofs
termining whether the petitioner had the right to con-
nd also recognized the fact that the court itself (where
ent cause is shown against the right) must select such
oners and fix the day for their first meeting. At pp.
e court said:

tract from Opinion of the Circuit Court.

en, therefore, the petition is presented to the court, answers of defendants have been heard, with the n each side, if the cause shown against the petition ficient, the court shall grant an order naming three sted freeholders to act as commissioners of ap- and shall fix the day for the first meeting of these sioners."

swer of the defendant raised issues squarely. It (amongst enses) denied, in varied form, that the right of way of the was 100 feet wide; it declared in substance that this right as in many places very much less than 100 feet broad; as too narrow to make it physically possible to con- telegraph line thereupon in such manner as not to in- with ordinary travel. It declared, in effect, that the posed to be constructed by the Telegraph Company rossly imperil the running of trains and grossly ob- e ordinary use of the railroad. See record, p. 60, par- 1.

Extract from Answer of Railroad Co.

Further answering, defendant denies 'that the right of this defendant is 'about 100 feet wide, and it about 50 feet from a line along the centre between s of said main track;' on the contrary, defendant hat the strip of land along which its tracks are laid trains are run varies greatly in width at different

ints along its line, and that at sundry points along said
e included in and covered by the condemnation proceed-
gs of the plaintiff is much less than 100 feet in width, in-
ed, is so narrow that to erect a telegraph line thereupon
the manner set out in said petition would be impracti-
ble, or, at least, would grossly imperil the safe operation
defendant's railroad, and grossly obstruct or hinder the
ual travel thereupon."

The plaintiff Telegraph Company *demurred* to this answer
l the court *sustained the demurrer.* When the court sustained
e demurrer, it declared in substance that the answer was
thout merit; that even though the Railway Company might
ve all the averments of the answer, by legal and conclusive
dence, yet the plaintiff would be entitled to the relief prayed;
t the plaintiff had the right to condemn a right of way upon
e land of the defendant.

In a word, the court determined that the Telegraph Co.
s and had the lawful right to construct its lines upon ap-
llant's railroad, notwithstanding the distinct and definite
mission of the Telegraph Co., by its demurrer to defend-
t's answer, that, as a matter of fact, the strip of land con-
tuting the roadway of the Railroad Co.—"is so narrow
t to erect a telegraph line thereupon in the manner set
t in said petition would be impracticable, or, at least,
uld grossly imperil the safe operation of defendant's
lroad, and grossly obstruct or hinder the usual travel
reupon."

Of course, after sustaining the demurrer to appellant's
wer, the court acted logically in refusing to allow appellant
introduce testimony sustaining the averments of its an-
er." When the court, upon demurrer, determined that
re was no merit in any of the defenses set up in the answer,
robably considered it idle to allow the introduction of testi-
ny establishing facts which the Telegraph Company admitted
e true, and which the court considered insufficient to defeat
rights claimed by the Telegraph Company. But, in adopt-

v, the court closed and ended the case, upon every ques-
the petition and answer—save and except *the amount*
ion; and the Railroad Company was practically
om further defending itself, upon any other ground

The defendant, however, was advised, and is to-
, that the time had not arrived for battle upon this
ion of compensation, and would not legally arrive,
urt should first permit it to introduce proofs upon
t and *jurisdictional* questions raised in its answer,
pass upon these proofs adversely, holding that they
ain and establish these vital defenses.

aspect, legal and practical, the questions raised in
re vital questions to the appellant. Not only do
n and determine the existence or non-existence of
the Telegraph Company to condemn the property
oad, but upon their solution depends the railroad's
' possession and control of its own right of way,
to the efficient discharge of its great public duties
ions. Compared with these considerations, the
noney compensation to be awarded the defendant,
roperty shall be taken by the petitioner for its pur-
subordinate importance.

ppellant is further advised and submits, that the
North Carolina do not contemplate or provide for
sation whatever being awarded, under the condi-
th in its sworn answer; that these statutes do not
or intend that any sum of money, however great,
l paid in damages, can authorize the petitioning
Company to construct and maintain its lines upon
way of the defendant railroad, or properly com-
railroad therefor—if such construction will ob-
der the usual travel on such railroad, or imperil
ration, as it is clearly set forth in the defendant's
construction and maintenance will do.

tiff in error is yet further advised and submits that
he above *not the theory of said statutes*, but that said
e been *so construed* by the honorable Circuit Judge

trial court, by his said order of October 24, 1898, and id order is therefore erroneous and clearly final.

finality of an order is uudoubtedly to be determined legal effect. If then, an order refuses to hear proof jurisdictional conditions precedent set up in sworn an- and, in spite of the defendant's distinct plea, backed up plaintiff's substantial admission, that said plaintiff is titled to the property claimed by him—indeed, that such is clearly excluded by the express proviso of the very upon which alone such claim is and can be based—if , in the face of all this, such an order authorizes, not, , the court, but a third person, to appoint commission- assess the value of the defendant's property, refusing n opportunity to prove anything, save the amount of nsation to which he is entitled, and, upon payment of nount fixed by such commissioners, further authorizes itioning plaintiff to take and hold the property so val- would seem clear beyond dispute that such an order as *every element of finality.*

ortant side-light is thrown upon our position with re- the character and finality of the order of October 24, nd it is brought out in clear relief, by the opinion of preme Court of the United States in the case of *E. Tenn. Ga. R. R.* v. *So. Tel. Co.*, 112 U. S., 306, etc., which p upon error to the United States Circuit Court for the district of Alabama, and involved the construction of inent Domain Statute of that State. The court, upon 309–310, says:

is is a proceeding, under the statute of Alabama, to as- the amount of compensation to be paid the railroad ny for the appropriation of its property to the use of the ph company. That is the single question to be settled. emedy is statutory only, and every court which takes ction for its enforcement is limited in its powers by the under which it alone can act. It must be assumed, for purposes of the proceeding, that the telegraph company e right to make the appropriation, and that as soon as

ation is made, it may enter on the property and ork its lines."

ould not make more clear the distinction—nay -between cases of this character, in which it is * * that the telegraph company has the the appropriation," and "the single question to "the amount of compensation to be paid the any"—and the case at bar, in which the defend- ry threshold of the proceeding, raises questions nce *the existence of the right* and the *jurisdiction of*

THIS COURT JURISDICTION?

ion is denied upon the sole ground that the or- om is *not final or appealable.*

al basis of our application to this honorable found in the order entered October 24, 1898, ication also incidentally includes and is strength- rors embodied in the other and earlier orders. *nderstood, however, that the plaintiff in error is not an order appointing commissioners to fix compensa-* when the character of its above-mentioned an- ghly comprehended—to which answer the order h sustained the demurrer of the plaintiff, and of which it refused to allow the defendant to ofs—it will be seen that, not only were the mer- involved, but the entire basis of the proceed- dant's answer not only denying the existence horizing the condemnation of its property by also vouching for its protection and defense, viso of the statute upon which the plaintiff re- which it proposed to proceed, and offering to oof, the absence of the indispensable condition ne application and operation of said statute, as proviso.

aware that, in ordinary condemnation suits, an

appealable order is not reached, indeed, cannot be entered until *the amount of compensation* is awarded by the commissioners and confirmed by the court; and this, because there is really no other substantial question involved.

But, in the case at bar, not only did the defendant below deny the existence of any statute under which the condemnation of its property for the purposes of the plaintiff could be lawfully conducted and effectuated, but it also charged and offered to prove that its right of way was of such a character that the telegraph line of the plaintiff could not be "so constructed and maintained as not to obstruct or hinder the usual travel" on its railroad; nay offered to prove much more than this, to-wit: that "its right of way was so narrow that, to erect a telegraph line thereupon, in the manner set out in said petition, would be impracticable, or, at least, would grossly imperil the safe operation of defendant's railroad"—that is, would grossly imperil the lives of the citizens of the State and of the country at large, travelling upon defendant's railroad trains; and all this might happen without the entry of any further order by the court, which had turned the matter over to its clerk to appoint the commissioners and superintend their sessions; the statute, section 1946 of the Code, authorizing the plaintiff company to take possession of the defendant's property and to construct, maintain and operate its line thereupon, upon "payment into court of the sum appraised by the commissioners," upon the filing of their report in the clerk's office.

Just here we submit three questions, to-wit:

(1) Is the issue thus raised and the defense thus interposed in the answer a substantial issue and a valid defense, or not?

(2) Had the defendant, at the time he filed his answer, or will it ever have, the right and opportunity to raise this question and to interpose this defense?

(3) If so, when and where?

Could the defendant, though well aware of the existence of

a state of facts which must eventually defeat and render nugatory the entire expensive and vexatious proceeding before commissioners, yet remain silent and allow the court to appoint them and allow them to make their appraisal and report, (for surely such a question cannot be raised before them; neither their oath nor their duties, as defined by the order of September 15, 1898, page 42, nor their capacities cover or include such a question nor fit them to pass upon it), *and afterwards* take the chances of inducing the court to go back and take up a question which manifestly, in the nature and logic of things, should have been raised and disposed of, *before* all these steps were taken and proceedings had, the defendant having been thoroughly aware from the first that they must come to naught? Nay, under such circumstances it is hardly reasonable to speak of "*the chances*" of the court's hearing the defendant, if he should attempt, *after the coming in of the report*, to raise this obviously antecedent and fundamental question. Upon the general principles which regulate judicial procedure, it is clear the court would not hear the defendant who had thus failed to speak at the proper time, unless this failure was in some proper way explained and condoned. Indeed, if the court will kindly glance at section 1946 of the Code of North Carolina of 1883, and then at the order of September 15, '98, it will at once perceive that the chart of the commissioners' duties and powers is such that, neither upon the basis of the Code nor of the order, could it be logically possible to raise before them this issue, as to the defeat of the right to condemn, by the proviso as to obstruction or hindrance to travel.

In short, our view is that a condemnation proceeding, of the character of that under investigation, substantially embraces two separate and successive proceedings—the first of which concerns only and must determine the existence of the right to condemn, and the second is limited to the subsequent inquiry as to the amount of compensation to be paid, for property adjudged in the first proceeding to be liable to condemnation. To the defendant railroad company, the essential question is, whether it may retain the exclusive

possession and control of its right of way, which it regards as indispensible to the safe and efficient discharge of its great public function and duty, or whether it shall be compelled to receive upon its right of way another company which will have independent and antagonistic rights thereon. Any order which determines that question is a final order in that proceeding; the final order, indeed, to the railroad; and the question of the amount of compensation is essentially another and distinct question and issue, triable before another tribunal, after the court has disposed of the prior and graver question, as to the existence of the right to condemn. To such an extent, indeed, did the trial court take this view of the matter, that it actually, and as we claim erroneously, turned over this secondary phase of the proceeding to its clerk, even authorizing him to select and appoint the commissioners.*

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* **In the second assignment of errors printed in full at record page 85,** the Railway Co. submitted (amongst other errors there assigned) that the Court "erred in directing its clerk to appoint commissioners to assess damages as therein set out, and erred in prescribing the oath to be taken by said commissioners and in directing the mode of procedure and the principles and rules by which said commissioners should be governed, and erred in fixing the place for the sessions of said commissioners and how they shall be presided over, and the elements to be considered by them and the form and substance of their report."

The order of September 15th, 1898, appointing commissioners (record, pp. 42–43) provided (amongst other things) as follows: viz:

(a.) **"It is ordered that S. L. Trogdon, Esq., clerk of this court at Greensboro, North Carolina, do appoint three disinterested and competent freeholders, resident in this district, and summons them before him.** * * *"

(b.) **"The said commissioners shall hold their meetings in the court-house of the United States, in the City of Greensboro, over which meetings said clerk shall preside.** * * *"

(c.) **"The first meeting of the commissioners, of which the said clerk shall give due notice to them and to the parties, shall be held ten days after notice of their appointment has been served on the parties to this cause.** * * *"

This order is in direct violation of Section 1945 of the Code of North Carolina, which provides (amongst other things) as follows:

"The court shall hear the proofs and allegations of the parties, and,

Let us now briefly examine the statutes and decisions of North Carolina regulating the matter of appeals, and then a few authorities from other States and jurisdictions recognizing in analogous cases this dual character of condemnation and certain other proceedings, with the bearing and effect of this feature upon the question as to *the finality or appealable character of decrees and orders.* We trust that, even such a hurried examination as we shall be able to make will serve to show that the principles and positions above enunciated are recognized by the courts, and have been approved even by the Supreme Court of the United States.

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f no sufficient cause is shown against granting the prayer of the petition, it shall make an order for the appointment of three disinterested nd competent freeholders, who reside in the county where the premses are to be appraised, for the purposes of the company, and shall fix he time and place for the first meeting of the commissioners."

The full text of this section will be found at p. 51 of the record.

It is respectfully submitted that the Circuit Court could not rightfully delegate its power to appoint commissioners to S L. Trogdon, Esq., its clerk.

The selection of commissioners was a matter of vital importance. The statute imperatively required them to be disinterested and competent freeholders. The questions of competency and disinterestedness were important subjects to be considered by the court in the appointment of such commissioners. It would take one of much boldness to contend that an incompetent freeholder should be appointed. It would take one of greater audacity to suggest that an interested freeholder could impartially discharge the duties of a commissioner. The determination, of the competency and disinterestedness of the freeholders to be appointed, was lodged by the statute, in the sound legal discretion of the court. It was a burden and duty placed upon the court. If a case arose requiring the appointment of commissioners, the court and the court only could make the appointment. If the court could abdicate its important functions in this matter and clothe its clerk with the power of appointment, it could delegate the power to any other officer of its court, to any member of its bar, to an individual at large.

The order of September 15, 1898, directed that **"the said commissioners shall hold their meetings in the court-house of the United States in the city of Greensboro."**

It is provided in the early part of Section 1946 of the Code of North Carolina in respect to said commissioner, that: **"They shall view the premises described in the petition."** See p. 52.

The requirement of said order that **"said commissioners shall hold**

WHEN APPEALS MAY BE TAKEN.

Extracts from the Code of North Carolina, Regulating Appeal.

"*Sec. 562. Intermediate orders affecting the judgment may be reviewed on appeal. C. C. P., s. 313.*

"Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment."

"*Sec. 945. Supreme Court, its jurisdiction. Const., Art. IV, s. 8, C. C. P., s. 413.*

"The Supreme Court shall have jurisdiction to review, upon appeal, any decision of the courts below, upon any matter of law or legal inference * *."

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their meetings in the court-house of the United States in the city of Greensboro," was in disregard of said provision of the statute. It was greatly prejudicial to the rights of the Railway Co The case at bar was one in which it was peculiarly necessary that the commissioners should view the premises. The strongest conceivable reasons exist for a view of the premises where a telegraph company seeks by hostile means and the strong arm of the law to condemn a right of way for its purposes along the narrow strip of land constituting the road-bed of a railway company. This proposition, capable of endless elaboration, seems too plain to require discussion.

The order of September 15th, 1898, goes further in respect to said meetings. It provides that "the said commissioners shall hold their meetings in the court-house of the United States, in the city of Greensboro, **over which meetings said clerk shall preside."**

The words "said clerk" refer to S. L. Trogdon, Esq., by whom said commissioners were to be appointed.

Where is the authority for the appointment of this presiding officer? The court migh as well have appointed a stranger as its clerk. If it had the power to appoint the one, it had the power to appoint the other. The mandate of the statute is, in a proper case, that **"the court shall appoint three disinterested and competent freeholders."** Where is the authority for the enlargement of this body? Where is the authority for adding, not simply a fourth commissioner, but one clothed with the power of a presiding officer? What were to be the powers and duties of this presiding officer? Was he to guide and direct their deliberations? Was he to charge

"*Sec. 962. On appeal from interlocutory judgement, &c., no judgment to be entered; opinion with instructions to be certified to court below. R. C. c. 33, s. 14, 1831, c. 20, s. 3.*

"When an appeal shall be taken to the Supreme Court from any interlocutory judgment, the Supreme Court shall not enter any judgment reversing, affirming or modifying the judgment, order or decree so appealed from, but shall cause their opinion to be certified to the court below, with instructions * *."

"*Sec. 548. Appeal, in what cases it may be taken. C. C. P., s. 299.*

"An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of

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them as the court charges a jury? Were his powers advisory or mandatory? Were the commissioners to defer to his views, or might they follow their own, where a difference of opinion existed? Did he have a vote in fixing the amount of compensation?

The order of September 15th, 1898, record, pp. 42-43, provides that "the first meeting of the commissioners * * * shall be held ten days after notice of their appointment has been served on the parties to this cause." Under this order the clerk fixed the time for the first meeting of the said commissioners. By issuing notice at an early or late day, the clerk could have the commissioners to meet at such time as he, in the exercise of his discretion, wisely or unwisely, might determine, while the statute contemplated that the court, in the exercise of a sound legal discretion, should fix the time for the first meeting of the commissioners. The language of the statute conferred this power upon the court. The order, in violation of the statute, delegated this power to a third person.

The powers conferred upon S. L. Trogdon, Esq. (Clerk), were never contemplated by the Act of Congress clothing Circuit Courts of the United States with jurisdiction, and providing for the removal of causes from a State to a Federal tribunal. The Constitution of the United States and the statutes made in pursuance thereof contemplated that judicial power and authority should be exercised by the courts of the United States, and not by a private individual even though such private individual might occupy the ministerial position of clerk of the Federal court. When this cause was removed from the State court to the Federal court, the Railway Co. had a right to expect that all judicial power should be exercised by the Court and that all orders affecting its rights should be made by this tribunal.

term, which affects a substantial right claimed in any action or proceeding; or which, in effect, determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial."

Decisions of the Supreme Court of North Carolina construing and applying the provisions of the Code of that State regulating appeals.

92 N. C., 657.

Subject: When Appeal May be Taken.

In *Merrill* v. *Merrill*, 92 N. C., 657, the first two paragraphs of the syllabus are as follows:

"1. An appeal can be taken from an order of the Superior Court either making or refusing to make additional parties, when such order affects a substantial right of the appellant; and *it seems* that the appeal may either be taken at once, or it can be assigned as error on an appeal from the final judgment."

"2. An appeal lies at once from an interlocutory order that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining."

Merrimon, J., in delivering the opinion of the court (page 659), said:

"It is well settled in respect to the time when it may be taken, that an appeal always lies at once from an interlocutory order or judgment that may in effect put an end to the action, or that may prejudice a substantial right of the party complaining, if the appeal should be delayed until after the final judgment upon the merits."

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78 N. C., 181.

Subject: When Appeal May be Taken.

In *Commissioners of Wake County* v. *Magnin*, 78 N. C., 181, Reade, J., in delivering the unanimous opinion of the court (pp. 184–5) said:

"It is objected by the plaintiffs that the order below, over-

the demurrer, was not appealable; because it was not a udgment nor did it affect *substantial rights*. C. C. P., s.

'e have, however, over and over again, entertained ap- from such orders; and although it may admit of doubt er the Code would not bear a different construction, yet matter of practice which experience can best test, and if to be inconvenient, it can be easily altered by legislation, sibly by a rule of this court. But it ought not to be left to wreck legal navigation, and therefore we decide that der was appealable. In this case it works well, because an end to the action and saves the expense and trouble ial which could have availed nothing. But in a kindred etween the same parties at this term, where the demur- overruled, it had not the same advantage; for the case go down for an answer and trial. Yet even in that case cision of this court upon the demurrer may be, and we se will be, decisive of the case upon its merits.

here is error. Judgment reversed and judgment here fendants."

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91 N. C., 418.

Subject: When Appeal May be Taken.

rsey v. *Railroad*, 91 N. C., 418.

il action for damages tried at Fall Term, 1883, of Gaston ior Court.

e defendants demurred to the complaint on the ground t did not state facts sufficient to constitute a cause of .

the hearing the demurrer was overruled and, judgment rendered for the plaintiff, the defendant appealed.

ith, C. J., in delivering the unanimous opinion of the (p. 419), said:

he right of the defendants at once to appeal from a judg- overruling a demurrer to the complaint is expressly de- l in the case of *Commissioners of Wake* v. *Maguin*, 78 N.

C., 181, and has been repeatedly recognized and acted on since."

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95 N. C., 248.

Subject: When Appeal may be taken.

In the case of *Clements* v. *Rogers*, 95 N. C., 248, the first paragraph of the syllabus is as follows:

"I. Where an action is brought for an account, and the answer pleads matter in bar of the account, and a trial is had of the issues raised by the plea in bar, an appeal lies by the defendant from a judgment ordering an account before the account is taken."

Decisions of the Supreme Court of Appeals of West Virginia, holding that the right to condemn should be determined before the appointment of commissioners, and that the order determining such right is an appealable one.

6 W. Va., 397.

Subject: Order determining right to condemn immediately appealable.

In the case of *Ches. & Ohio R. R. Co.* v. *Pack*, 6 W. Va., 397, the court at pp. 408–411, said:

"Under the provisions of Chapter 42, when a company, incorporated for the construction of an internal improvement, makes application to a Circuit Court to appoint commissioners to ascertain a just compensation to the owner of land proposed to be taken, the applicant must prove or the owner admit, or it must in some way appear to the court, that the applicant has a lawful right to take the land for the purpose stated in the application, and the court must decide that fact, before the appointment of freeholders. The right to take the land implies the consent of the owner: unless the land be in a city or incorporated town, when consent is not necessary. Consequently the consent, when requisite, must be approved, or admitted or given in court, before or at the time when the court adjudicates the right to take the land and proceeds to appoint commissioners."

After the court has acted, when it appears by the record
a proper application in writing was made to the court, and
ice given to the owner of the land, or he appeared, and it is
nd recited that the court was of opinion that the applicant
lawful right to take the land, and the court appointed free-
lers, and, with the action of the parties themselves, organ-
l the commissioners, this implies either the consent of the
ner, or the location of the land in a city or incorporated
n—one or the other of which facts is indispensable, though
ner is sufficient, to authorize the judgment as to that primary
. Though after the commissioners have been appointed,
t should appear on the record or be within the recollection
the Court, that there was no proof or admissions of either
these facts, or any others necessary to the judgment given
l consequent action taken; or if the owner should show to
court that notwithstanding his employment of reasonable
gence, he was, by fraud, accident or mistake, prevented
m defending or excepting to the proceeding, and that the
ual facts were not adduced, or that those presented to the
rt might have been overthrown or avoided, or did not war-
t the judgment; the court before which the case was pend-
should set aside the judgment and action; and, if, under
such circumstances, the court failed to do so, and the facts,
uld by bill of exceptions, or otherwise, appear in the record,
s court would reverse the judgment. But, when no such
ng appears, this court must presume that the judgment of
Circuit Court was proper and accordingly must affirm it."

"Many authorities, upon subjects more or less analagous,
ongly indicate that even though the owner may not have
ressly consented that an improvement company applying
it, should take his dwelling house and adjoining land, yet
company's filing the application, their notice to, or the ap-
rance of the owner, and his failure to object—especially
en he participates in the designation of commissioners to
praise the land—in themselves constitute or conclusively im-
consent."

"If the court, with the co-operation of the parties, should

t commissioners, whose duty it would be to bring wit- before them, hear them testify, read depositions, and go and view the land, hear counsel, and ascertain a just nsation to the owner for the land to be taken, and dam- other land, beyond the peculiar benefits to be derived the contemplated improvement, and make their report; ore the court should finally determine the right to take nd for any compensation whatever; this would occasion t unreasonable and onerous expenditure of labor and , without assurance of benefit to either party. With practice, the owner would take his chance for high es, and afterwards, if he were disappointed, would deny nsent, or controvert the right to take the land, and so the purpose of the proceeding. Failing to object and uently supposed to consent, he would thus abuse the ity of the applicant, evade the vigilance of the court, aving availed himself of the attendance and examination nesses, and the action of commissioners, would after- as the result might be favorable or unsatisfactory, adopt ect the appraisement."

he commissioners are charged with no inquiry as to the t of the owner, and nothing as to that fact can properly sented to or considered by them. Indeed, so far as the e expresses its purpose, the court itself, having appointed ommissioners, has afterwards no power in any case to sider the propriety of what it did. Though, I suppose, the peculiar circumstances heretofore suggested, the may review and reverse its former action and again act e subject."

xcept under such circumstances, when the report has returned, if no good cause relative to the action of the issioners be shown against the report, and it be not erro- or defective on its face, the court should confirm it.

* * * * * * * "

nder the law, the court enters no other judgment than, o determine the legal right to take the land, and, after mmissioners have acted, to confirm their report. From

gments, without other sentence or condemnation, the right of the applicant, within twelve months late of the report, to pay the sum ascertained, with nd thereupon to become invested with the title to the

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31 W. Va., 710.

Order determining right to condemn immediately appealable.

case of *Railroad Co.* v. *Iron Works*, 31 W. Va., 710, oad Company sought to condemn certain property to the Iron Works. The latter answered denying roperty could be lawfully condemned in that pro- out the trial court, upon consideration of the plead- evidence, determined that the Railroad Company had to condemn the property of the Iron Works, and determined, appointed commissioners to appraise the he property. At this stage of the proceedings the ks obtained a writ of error and supersedeas, and the heard by the Supreme Court of West Virginia and The unanimous opinion of the court was delivered n, President, who (with regard to the action of the), at pp. 717–718, said:

.* the court found for the petitioner on the issues nd thereupon it was considered by the (trial) court er notice had been given, and that the said petitioner l right in this proceeding to take for the purposes the amended petition, the several parcels of land in mended petition mentioned and described, and for poses to acquire title to said parcels upon just com- ; to which ruling and judgment of the court the , Benwood Iron Works, excepted, and tendered its ceptions thereto, and asked that the same might be d sealed by the court and made a part of the record hich was accordingly done. The court then proceeded t the commissioners. To this order the Benwood ks obtained a writ of error and *supersedeas*."

main question to be decided is: Was the use to which

ds sought to be condemned were to be put, a public use? then, of course, the lands could not be legally con- d under the law of eminent domain. If the use were then it matters not that the Benwood Iron Works had nty years reserved its lot for the purpose of building a urnace thereon. It could be taken for public use, and s to the Co. could be compensated in damages. The n here is not one of compensation, but it is whether itioner had the right to take the property. It, of course, right to take private property for private use, but it has ht to take private property for public use, on paying a mpensation therefor. The right to take, which depends whether it is to be taken for public or private use, is a l question, and the decision of the Circuit Court on that n is subject to review. *Railroad Co.* v. *Railroad Co.*, 17 ., 812."

34 W. Va., 155.

ct: Order determining right to condemn immediately appealable.

he case of *Bridge Co.* v. *Bridge Co.*, 34 W. Va., 155, the ing Bridge Company petitioned the Circuit Court of ounty, West Virginia, to condemn certain land belong- the Wheeling & Belmont Bridge Company. The de- t company filed seven pleas, of which three were rejected sue was joined on the remaining four. A jury was im- d, and found in favor of the plaintiff Thereupon, an was made determining that the property of the defendant ny was subject to condemnation, and commissioners ted to assess damages. At this stage of the proceedings eal was taken to the Supreme Court of Appeals of West ia and the judgment of the trial court was affirmed.

delivering the unanimous opinion of the court, Lucas, , at p. 162, said:

jury was impanelled, and upon the defendant's four upon which issue was joined, they found separately for

, and then rendered a general verdict as follows:
ıry, find for the petitioner, the Wheeling Bridge
ın each and all of the issues joined.' Thereupon
as rendered, that there was necessity to condemn
demanded, and a commission was appointed to
t compensation to the owners. Proceedings were
however, until a writ of error could be prosecuted
t."

order of the Supreme Court of Appeals of West
firming the judgment of the trial court, the case
to the Supreme Court of the United States, and
der the title of *Belmont Bridge* v. *Wheeling Bridge*,
87.

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35 W. Va., 205.

der determining right to condemn immediately appealable.

ling Bridge & Terminal R'y Co. v. *Camden Consoli-*
., 35 W. Va., 205 an appeal was taken from the
f the trial court that certain property was subject
ation and appointing commissioners, and the judg-
ffirmed by the appellate tribunal.
to appeal from the judgment of the trial court,
that the property was subject to condemnation,
ing commissioners to assess damages, was consid-
ll settled, that the point was not noticed or dis-

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of the Supreme Court of the United States re-
he proceedings in a West Virginia condemnation
he appointment of commissioners as "a distinct
," and also following the State Court as to the
character of the prior order determining the
ndemn.

138 U. S., 287.

Subject: When order final or appealable.

In *Belmont Bridge* v. *Wheeling Bridge*, 138 U. S., 287, Mr. Justice Field, in delivering the unanimous opinion of the court, at p. 290, said:

"The defendant in error, the plaintiff below, moves in the alternative to dismiss the appeal on the ground that the judgment recovered is not final, or to affirm the judgment on the ground of the manifest insufficiency of the errors assigned. The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. A right to condemn, as held by the Supreme Court of the State, is to be determined before the appointment of commissioners to estimate the amount of compensation to be made. *Baltimore & Ohio Railroad* v. *Pittsburgh, Wheeling, &c., Railroad*, 17 W. Va., 812. **If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners, to be appointed, and might therefore be treated as being a distinct proceeding.** The judgment appears to have been considered by that court as so far final as to justify an appeal from it; and if the Supreme Court of a State holds a judgment of an inferior court of the State to be final, we can hardly consider it in any other light, in exercising our appellate jurisdiction. The motion to dismiss must therefore be denied. * * *"

We quote from other decisions of the Supreme Court of the United States, not as furnishing a strict analogy to the case at bar, but rather for the purpose of showing that

The oft quoted rule that an order or decree—which leaves anything further, of a judicial nature, to be done in the

cause, is not final or appealable is not to be regarded as a rule of universal application.

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3 Cranch, 179.

Subject: When order final or appealable.

In *Ray* v. *Law*, 3 Cranch, 179, the court said:

"The act of Congress points out the mode in which we are to exercise our appellate jurisdiction, and only authorizes an appeal or writ of error on a final judgment or decree.

* * * * * * * *

"The court, however, is of opinion that a decree for a sale under a mortgage is such a final decree as may be appealed from. We suppose, that when the court below understands that to be our opinion, it will allow an appeal, if it be a case to which this opinion applies."

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13 Peters, 13.

Subject: When order final or appealable.

In *Whiting and others* v. *The Bank of the United States*, 13 Peters, 4, the court at page 13 said:

"But is the objection itself in principle well founded? That depends upon this: whether the decree of foreclosure and sale is to be considered as the final decree in the sense of a court of equity, and the proceedings on that decree a mere mode of enforcing the rights of the creditor, and for the benefit of the debtor; or whether the decree is to be deemed final only after the return and confirmation of the sale by a decretal order of the court. We are of opinion that the former is the true view of the matter. The original decree of foreclosure and sale was final upon the merits of the controversy. The defendants had a right to appeal from that decree, as final upon those merits as soon as it was pronounced, in order to prevent an irreparable mischief to themselves. For, if the sale had been completed under the decree, the title of the purchaser under the de-

cree would not have been overthrown, or invalidated even by a reversal of a decree; and consequently the title of the defendants to the lands would have been extinguished; and their redress upon the reversal would have been of a different sort from that of the restitution of the land sold. In *Ray* v. *Law*, 3 Cranch R., 179, it was held by this court that a decree of sale of mortgaged premises was a final decree in the sense of the Act of Congress, upon which an appeal would lie to the Supreme Court. This decision must have been made upon the general ground that a decree, final upon the merits of the controversy between the parties, is a decree upon which a bill of review would lie, without and independent of any ulterior proceedings. Indeed, the ulterior proceedings are but a mode of executing the original decree, like the award of an execution at law. * * * * "

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6 Howard, 201.

Subject: When order final or appealable.

In *Forgay* v. *Conrad*, 6 How., 201, this court at page 203 said:

"The question upon the motion to dismiss is whether this is a final decree, within the meaning of the acts of Congress. Undoubtedly, it is not final, in the strict, technical sense of that term. But this court has not heretofore understood the words 'final decrees' in this strict and technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature."

And at page 204 the court said:

"* * * * And when the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal

to this court, although so much of the bill is retained in the Circuit Court as is necessary for the purpose of adjusting by a further decree the accounts between the parties pursuant to the decree passed."

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2 Black, 530.

Subject: When order final or appealable.

In *Bronson* v. *Railroad Company*, 2 Black, 524, the court, at pp. 530–531, said:

"If this court should find that Bronson & Soutter are entitled to their whole claim, and in the meantime the property is sold and out of their control, how would their success benefit them? It would be a victory barren of results. If the decree was reversed there could be no restitution of the road, its property and franchises; for the purchasers at a judicial sale are protected.

"A rule, from which consequences so injurious to the rights of parties litigant would necessarily result, has never received the sanction of this court.

"This decree is not final, in the strict technical sense of the word, for something yet remains for the court below to do. But, as was said by Chief Justice Taney, in *Forgay et al* v. *Conrad* (6 How., 203), 'this court has not therefore understood the words 'final decrees,' in this strict, technical sense, but has given to them a more liberal, and, as we think, a more reasonable construction, and one more consonant to the intention of the Legislature.

"In the case of *Ray* v. *Law* (3 Cranch, 179), and *Whiting* v. *The Bank of the United States* (13 Wheaton, 15), this court has decided that a decree for the sale of mortgaged premises is a final decree from which an appeal lies. The court rested their decision on the ground that when the mortgage was foreclosed and a sale ordered, the merits of the controversy were finally settled, and the subsequent proceedings were simply a means of executing the decree."

7 Wall., 342.

Subject: When order final or appealable.

In *Thomson* v. *Dean*, 7 Wall., 342, a motion was made to dismiss the appeal on the ground that the decree from which it was taken was not final.

The Court refused to dismiss the appeal, and its ruling is stated in the syllabus, as follows:

"1. The rule laid down in *Forgay* v *Conrad*, (6 Howard 204), as to what constitutes a final decree for the purpose of an appeal, recognized as the true rule on the subject.

"2. Hence, where a bill related to the ownership and transfer of certain stock, a decree was held to be final when it decided the right to the property in contest, directed it to be delivered by the defendant to the complainant by transfer, and entitled the complainant to have the decree carried immediately into execution, leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership."

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105 U. S., 527.

Subject: When order final or appealable.

In *Trustees* v. *Greenhow*, 105 U. S., 527, Mr. Justice Bradley in delivering the opinion of the court at page 531 said:

"The first question, however, is, whether these orders do or do not amount to a final decree, upon which an appeal lies to this court. They are, certainly, a final determination of the particular matter arising upon the complainant's petition for allowances, and direct the payment of money out of the fund in the hands of the receiver. **Though incidental to the cause, the inquiry was a collateral one, having a distinct and independent character, and received a final decision.** The administration of the fund for the benefit of the bondholders may continue in the court for a long time to come, dividends being made from time to time in payment of coupons still unsatisfied. The case is a peculiar one, it is true; but, under all the circumstances, we think the proceeding may be regarded as so far independent as to make the decision substantially a final decree for the purposes of an appeal."

129 U. S., 206.

Subject: When order final or appealable.

In Farmers' Loan and Trust Company, 129 U. S., 206, this court awarded a mandamus directing the Judges of the Circuit Court to allow an appeal. The syllabus of the case is as follows:

"An order of a Circuit Court of the United States, in a suit in equity for the foreclosure of a mortgage upon the property of a railroad company, that the receiver of the mortgaged property may borrow money and issue certificates therefor to be a first lien upon it, made after final decree of foreclosure, and after appeal therefrom to this court, and after the filing of a supersedeas bond, establishes, if unreversed the right of the holders of the certificates to priority of payment over the mortgaged bondholders, and is a final decree from which an appeal may be taken to this court."

The first and fourth paragraphs of the opinion, pp. 213–215, are as follows:

"The reasons why the judges declined to allow this appeal may be substantially divided into two. The first and most important of these is, that the order from which the appeal is asked is not a final decree, within the meaning of the act of Congress on that subject, but is a mere ancillary proceeding for the protection of the property pending an appeal from the principal decree now before this court. But the doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court. *Blossom* v. *Milwaukee, &c., Railroad Co.*, 1 Wall, 655; *Forgay* v. *Conrad*, 6 How., 201; *Fosdick* v. *Schall*, 99 U. S., 255; *Williams* v. *Morgan*, 111 U. S., 684; *Burnham* v. *Bowen*, 111 U. S., 776."

* * * * * * * *

"These views we do not propose to elaborate, further than to say that if this order does not give the lender of the money

h prior lien upon the proceeds of the property of the com-
ıy, it is because the court had no authority to make it, and
t would be a fraud upon such lender justice could only be
ıe by enforcing it. If this view of the subject be correct,
which we entertain no doubt, the order is a final one. It is
ecree fixing upon the property, on which the trust company
v has a first lien, another lien of $120,000, and making it
amount to that. **It changes the relation of that company**
this property, displaces its rights as settled by a decree
w pending in this court, and if that decree is affirmed, it
effect modifies it, although this court may say that it
ould stand and be enforced. This order comes within all
e elements of finality which we can imagine to belong to
decree of the Circuit Court. It establishes certain rights
the parties, to the injury, as petitioners believe, of their
erests in the property.''

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140 U. S., 52.

Subject: When order final or apppealable.

In the case of *Hill* v. *Railroad Company*, 140 U. S., 52., Mr.
stice Field, speaking for the court, at pp. 53–54, said:

"The case is now before the court upon this last appeal, and
e question is whether, upon it, any of the matters which were
termined by the decree of June 8, 1885, are again open for
nsideration. All the errors alleged relate to that decree.
ne are assigned to the decree of July 14, 1887.

"We are of the opinion that the decree of June 8, 1885, was
inal decree, within the meaning of that term in the law re-
ecting the appellate jurisdiction of this court, as to all mat-
rs determined by it, and that they are closed against any
rther consideration. It disposed of every matter of conten-
on between the parties, except as to the amount of one item,
d referred the case to a master to ascertain that. It dismissed
e bill against several defendants for want of equity, and de-
ed relief to the complainant upon all matters in controversy
cept as to that amount, and retained the case only as against

rties interested in that matter. The rights and liabilities
he parties were in other respects determined.
nt there was no adjudication as to the payment of the
nt to be ascertained by the master; that remained unset-
It was, however, *a severable matter from the other subjects*
roversy and did not affect their determination. The fact that
not disposed of did not change the finality of the decree
he defendants against whom the bill was dismissed; that
nt, or to whom made payable, did not concern them.
were no longer parties to the suit for any purpose The
from the subsequent decree did not reinstate them. All
erits of the controversy pending between them and the
ainant were disposed of, and could not again be reopened,
on appeal from that decree. As to the other parties,
nained to ascertain the amount of one item and to
nine as to its payment. The decree of July 14, 1887,
d that matter, and finally disposed of it. *The decree of*
8, 1885, was appealable as to the matters which it fully de-
d; so also was the decree of July 14, 1887, as to the sever-
atters which it involved. Todd v. *Daniel*, 16 Pet., 521;
y v. *Conrad*, 6 How., 201; *Withenbury* v. *United States*, 5
819; *Germain* v. *Mason*, 12 Wall., 259; *Milner* v. *Meeks*,
S., 252. But the time to appeal from the first decree
d; and, no question being raised as to the second decree,
f July 14, 1887, it must be *Affirmed, and it is so ordered.*"
s ours.)

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have thus adduced and quoted decisions from the
of last resort, in the State in which this proceeding
originally brought,—decisions from the highest court
other State, carefully construing a statute *in pari materia*
that here under construction, and where the question
and passed upon was strictly analagous to that we
raised and which is now before this court for decision,
lastly, decisions to the like effect from the Supreme
of the United States. If we understand them, the
of all these authorities is that—courts of last resort
ot "stick in the bark," but endeavor to decide cases

according to their essential logic and the very right of the cause; so that, where, as in the case at bar, a distinct and severable question, indeed ***the great question in the cause***, has been passed upon by the court; and by it, vital rights of one of the litigants have been so far settled that, without further order of the court, the possession of his property will pass to the opposite party, who may at once enter and build thereupon his own structures—such an order as this, we say—an order thus embodying every essential element of finality—will be held by this honorable court to be ***an appealable order.***

The Circuit Court of Appeals, in its opinion in the case at bar, refers to the following decisions of the Supreme Court of North Carolina, viz: Telegraph Co. v. W. C. & A. R. R. Co., 83 N. C., 420; Commissioners v. Cook County, 86 N. C., 18; Railroad v. Warren, 92 N. C., 620; Hendricks v. Railroad, 98 N. C., 431.

By reference to these cases it will be seen that they are widely different from the case at bar.

In No. 1. *Telegraph Co.* v. *W. C. & A. R. R. Co.*, 83 N. C., 420, the court, at page 423, said:

"*As the right to take possession is given only after final judgment of confirmation* and then is not interrupted by the appeal, we cannot reasonably understand the act as admitting the obstruction and delay resulting from appeal at an earlier stage of the proceeding."

Here is a plain declaration that the condemning corporation *in that case* could not take possession of the land of the defendant until after further action by the court; that is to say—*until "after final judgment of confirmation" of the report of the commissioners assessing damages. In that case a further order of the court was necessary, before the condemning corporation could exercise dominion and control over the land of the defendant.*

In the case at bar, the Postal Telegraph-Cable Company's counsel makes the following statement in his brief filed in this court on the 22d day of May, 1899, p. 4, namely:

* * * The motion was argued before that court " it Court of Appeals) " February 18, 1899, and decided 30, 1899, sustaining the motion, and dismissing the writ or for want of jurisdiction (opinion of Judge Morris, not orted, but printed on page 114 of original transcript of filed in this cause).

terwards, Judge Goff made an order reinstating the order of Judge Simonton for the appointment of com- ners, and directing the clerk to summon the commis- , upon notice to the parties, for the purpose of assessing mages to which the railway company was entitled, which ccordingly done, and the damages were assessed pur- to said order on the 21st day of April, 1899, and their was filed with the clerk of the court, as directed by the of Judge Simonton, of September 15, 1898. And im- ely upon the filing of the report, the telegraph company o the clerk, for the Southern Railway Company, the t of damages assessed by said commissioners, taking his therefor, and at once commenced the construction of graph line, as authorized under section 1946 of the Code rth Carolina, and continued on said work until inter- by *supersedeas* upon the writ of error now pending in urt."

ther comment cannot more widely differentiate the f Telegraph Co. v. W. C. & A. R. R. Co., 83 N. C., 420, he case at bar.

2. *Commissioners* v. *Cook County*, 86 N. C., 18, was a pro- g to condemn land for the construction of a fence in county.

defendant appealed from an order appointing commis- to assess damages, and the court, in dismissing the ap- ommented, at pp. 19-20, upon the fact that an appeal wholly needless in this incipient stage for the protection right or interest of the unwilling land-holder"—*in that*

o. 3, *Railroad Company* v. *Warren*, 92 N. C., 620, no l damage or injury could result to the defendant by ing his appeal until after final judgment.

No. 4, *Hendricks* v. *Railroad*, application was made by a owner for the appointment of commissioners to determine amount of compensation which should be paid him as ages for the construction of a railroad across his land, h railroad *had already been constructed.*

xton v. *North River Bridge Co.*, 147 U. S., 337, was cited he Circuit Court of Appeals in its opinion in the case at

deed, this was one of the cases, perhaps *the case*, mainly d on by the defendant in error in support of the position an order appointing commissioners in a condemnation eeding is not, and in the nature of things cannot be, a or appealable order—one upon which error will lie.

far from being authority for this proposition, the case directly sustains the position for which we contend, to- That the appealable character of such an order depends its real character and effect, and this depends upon the s, character, and effect of the eminent domain statute r which such commissioners are appointed. This is almost erms the opinion and decision of this honorable court in *ton* v. *North River Bridge Co.* In this case, after a brief ew of the facts, the court, at the top of page 338, said:

t the threshhold of the case lies the inquiry whether the order of the it Court, appointing commissioners to assess damages for the taking by etitioner of the respondent's land, is a final judgment upon which a of error will lie. This depends upon the terms and effect of the act of poration of the petitioner by the Congress of the United States, taken nnection with the general railroad law of the State of New Jersey."

his paragraph seems to us clearly to mean that an order of rt appointing commissioners to assess damages may be a judgment upon which writ of error will lie; that the stion whether or not such order is such final judgment de- ds upon the "terms and effect of the act" under which the t of eminent domain is to be exercised; that, independ- y of and without regard to such "terms and effect," it can- be predicated of an order appointing commissioners in a demnation proceeding either that it is or that it is not a

nt. If we are correct in our view as to the posi-
by the court in this paragraph—and we do not
can be mistaken—then it would seem to follow:
the order of October 24, 1898, which is the order
n in the case at bar, and by which, as we have
adjudicated, without the entry of any further
court, the right of the Telegraph Company to con-
d of the Railroad Company and also its right to
te possession of said land and to erect its struc-
on—is really a final and appealable order, and

at no decision of any court, in any other case,
an order for the appointment of commissioners in
ion proceeding is not such final or appealable
applicable here, unless the statute construed in
is substantially identical in "terms and effect"
te under construction in the case at bar.

ion with these two propositions, it should be borne
:

judicial decision should be regarded as settling
not raised in the case in which such decision was

t of these two last propositions, it will readily ap-
Luxton case cannot be considered as decisive of
the order appealed from in the case at bar; for—
ce:

Congress, if constitutional, conferred a plain right
not fettered by any conditions precedent, and the
ad law of New Jersey seems to have been equally
nd unembarrassed in this respect; certainly, no
o the existence of such conditions precedent was
Luxton case: while, on the other hand, not only
tute of North Carolina under construction in the
mbody such conditions, but they are palpable and
the very face of the statute, and were expressly
n the answer of the defendant company. Upon
t only was this defense ruled out, but the court,

e very teeth of the statute, refused to allow the defendant
pany to support its answer by proofs upon this point.

the second place:

s we understand the opinion of the court in the Luxton
, it was contemplated and provided, by the New Jersey
ute therein construed, that the commissioners (appointed
he order from which appeal was taken) should make re-
in writing of their assessment of damages and file the
e; that either party could then appeal to the trial court
the decision of the commissioners, and have the dama-
ascertained by the verdict of a jury, upon which verdict
gment could be entered; and that the condemning corpor-
n could not take possession of the property of the land
er, if either party demanded a trial by jury, until after
trial and verdict and a judgment of court thereon. That
say: If neither party appealed to the trial court, from the
rd of the commissioners, the court would enter judgment on
r report; but, if either party appealed, then there would
trial by jury and a judgment on the verdict. *In no event
l the condemning corporation take possession of the property of
and owner, until after the entry by the trial court of an order
equent to the order appointing commissioners.*

We can hardly be mistaken in this view of the effect of the
utes construed in the Luxton case, nor of the opinion of
court construing them. The express provision of the New
ey statute is as follows:

* * * ; *provided*, that in no case whatever shall said
pany incorporated under this act enter upon or take pos-
ion of any land of any person or persons for the purpose
ctually constructing said railroad or of making any erec-
or improvements whatever, or otherwise appropriating
lands to the use of any company incorporated under this
until they have paid to the party or parties entitled to re-
e the same the amount assessed by the commissioners as
value of such land or damages, in case the report of the
missioners is not appealed from, or if the same is appealed

e amount which shall be found by the jury by
ie shall be tried."

n the Luxton case, on page 341, says:

And if a trial by jury should be had, by way of appeal from
f the commissioners, it must likewise be in the same court.
hout, from the application of the corporation for the ap-
missioners to assess damages to the owner of the land pro-
, until judgment upon the award of the commissioners, or
of a jury, assessing those damages, remains in the Circuit
ed States and under its supervision and control."

iat, under the New Jersey statute, the damages
not payable upon the mere award of the com-
r until after a judgment of the court, affirming
the verdict of a jury rendered on appeal there-
s equally clear, that the condemning corporation
tle, nor right of possession, nor of entry, nor any
r of appropriating to its purposes the land of the
il the damages thus affirmed by judgment of the
d to the party entitled.

in the Luxton case was taken from the mere
ing commissioners, and it is noticeable that the
ssing and determining against the final and ap-
cter of this order, applied the tests which it had
he first paragraph of its opinion above quoted.
it further holds, if we understand the opinion,
r was not a final one, *because*, as we have shown,
nothing. We quote:

ceedings in the Circuit Court of the United States, in the
er the title of the corporation in the land to be taken, nor
wner to damages for taking it, would be adjudicated or
e the return of the award of the commissioners, it neces-
der the acts of Congress and the decisions of this court,
ppointing commissioners was interlocutory only, and that
was prematurely sued out, and must be dismissed for want

vell to append a brief summary of the radical
rence between the Luxton case and the case at
s, that is, which are clearly made in the case at

bar, and which were not and could not have been made in the Luxton case, *e. g.*:

In *Luxton* v. *North River Bridge Co.*:

1. It was not claimed, and it was not true, that conditions precedent had to be adjudicated by the court before it could be determined whether the act of Congress authorized the condemnation of the property of the land owner.

2. It was not averred, and it was not true, that any circumstances existed which rendered an appeal necessary at that stage of the proceedings, for the protection of the rights of the land owner.

3. It was not averred, and it was not true that irreparable injury would result to the land owner from deferring the appeal.

4. It was not averred, and it was not true, that the condemning corporation could enter into possession and exercise dominion and control over the property of the land-owner before any further order of the court.

5. It was not averred, and it was not true, that the property sought to be condemned was already a great artery of commerce.

6. It was not averred, and it was not true, that the lives and limbs of travellers upon a great public highway would be imperilled by deferring the appeal.

7. It did not appear by sworn answer (and demurrer thereto) that the proposed condemnation "would grossly imperil the safe operation of defendant's railroad, and grossly obstruct or hinder the usual travel thereupon,"—and that this might occur before any further order of the court.

Tested, then, by the principles clearly laid down by the court in the Luxton case, is it not clear not only that the orders appealed from in the two cases are world-wide apart in character and effect, but also that the order appealed from in the Luxton case was *not* a final or appealable order, and that the order appealed from in the case at bar *was* and *is* such final and appealable order?

HAS THE RAILWAY COMPANY THE RIGHT OF APPEAL.

But a single question remains to be considered, and this concerns not the merits of the case but the mode of procedure, *i. e.*, the course and right of appeal. In this regard, our position is, that:

The Railway Company was clearly entitled to appeal to this Honorable Court, from the decision of the Circuit Court of Appeals dismissing the writ of error in Southern Railway Co. v. Postal Telegraph-Cable Co.

The ground upon which the existence of such right may be questioned is the provision, embodied in Section 6 of the Judiciary Act of March 3, 1891, that, "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being * * * citizens of different States,"—final orders of the Court of Appeals are absolutely final; that no appeal lies therefrom to this Honorable Court.

The provision has no application to the case at bar, for two reasons:

1st. The jurisdiction of the Circuit Court in the case at bar did not depend entirely upon citizenship, but the plaintiff Telegraph Company expressly claimed rights under the act of Congress, of July 24, 1866.

At pages 21–25 of the printed record will be found the amended petition of the plaintiff Telegraph Company, filed in the clerk's office of the Circuit Court of the United States for the Western District of North Carolina, on the 22nd day of July, 1898. Upon page 22 it charges that:

"The telegraph line, when so constructed, will connect with the telegraph lines already constructed, owned and operated by it, making complete telegraphic connections throughout the United States of America, Canada, and and Mexico, with cable connections to Europe. (As amended by order of the

court.) And the Postal Telegraph-Cable Co. has, as required by Section 5268 of the Revised Statutes of the United States of America, filed its written acceptance with Postmaster General of the United States, of all the restrictions and obligations by the Acts of Congress, approved July 24th, 1866, entitled "An act to aid in the construction of telegraph lines, and to secure to the Government use of the same for military purposes."

At pages 40–42 of the record will be found a second petition of the plaintiff, filed in the office of said court on the 18th day of August, 1898, which contains the following averments:

"3. That said petitioner is chartered under the laws of New York with the authority to construct, maintain and operate its said lines throughout the U. S. including the State of N. C., and has applied with the acts of Congress approved July 24th, 1866, Revised Statutes, 5263 to 5269, as will fully appear by the certificate of the Post Master General shown to this Honorable Court, and is, therefore, authorized to construct its telegraph lines on all post-roads, and that said Railway Co's. right of way, is, under the acts of Congress, a post-road, and that said Telegraph Co. owns and operates connecting telegraph lines throughout the U. S. and Canada, with connecting cable lines across the Atlantic Ocean, and that it already has and operates telegraph lines in the said State of N. C., and that the line now proposed to be constructed upon the right of way of said defendant Railway Co., in said State will connect with its said lines heretofore constructed in said State, thereby making it a part of the great system of its lines extending throughout the U. S. as aforesaid, and that it is engaged in interstate commerce. * * *

"5. Petitioner avers that under the Acts of Congress aforesaid, it is entitled to the right, without obstruction, hindrance or delay, to construct its telegraph lines as prayed for in said petition" * * * *

The petitioning plaintiff, by its counsel, vigorously prosecuted and pressed its rights and claims under the Act of Congress, thus asserted, and the Honorable Circuit Court passed upon and denied them. What it had to say upon this phase of the case may be found at page 33 of the record.

It is clear, then, that the jurisdiction of the Circuit Court in the case at bar *did not depend upon diverse citizenship alone*.

2nd. This Court has recognized a construction of Section 6 of the Judiciary Act of March 3, 1891, to the effect that, although the plaintiff below may have proceeded in the trial court upon the ground of diverse citizenship alone; yet, if a federal question was actually involved in the case, the right of appeal from the decision of the Court of Appeals to this Court exists.

The logical outline of the established doctrine upon the vexed question of the jurisdiction of the Supreme Court over final orders of the Circuit Court of Appeals, so far as applicable to the case at bar, is substantially as follows:

"Congress intended to confer upon this court jurisdiction to pass upon the jurisdiction of the Circuit Courts of Appeals in cases involving the question of the finality of its judgment under section six of the act of March 3, 1891." *Aztec Mining Co.* v. *Ripley*, 151 U. S., 79.

This jurisdiction is to be exercised upon appeal or by *certiorari*—the entire structure of the act and the tenor of the cases construing it, showing that the presumption is in favor of the jurisdiction by appeal. It is, however, indispensable to the existence of this appellate jurisdiction that there should actually be a federal question involved in the case.

It is a further indispensable requirement, that it shall appear from the plaintiff's own statement of his claim, that the case is one arising under the Constitution, laws or treaties of the United States. It is not sufficient that the defendant shall make such statement, or that the federal question in the case shall be otherwise developed or appear in the course of the proceedings in the case. See *Press Publishing Co.* v. *Monroe*, 164 U. S., 105, 110, 112. See also in this connection *Tennessee* v. *U. P. Bank*, 152 U. S., 454; *Chappel* v. *Waterworth*, 155 U. S., 102, 107–8; *Oregon Short Line Ry.* v. *Skottowe*, 162 U. S., 490, 494–5.

But finally, it is not required that the plaintiff shall vouch and rely, exclusively and only, upon the federal feature of his case as the ground upon which he invokes the jurisdiction of the court. As was said by this court in *The Mayor* v. *Cooper*, 6 Wall., p. 252: "Nor is it any objection that questions are involved which are not all of a federal character. If one of the latter exist, if there be a single such ingredient in the mass, it is sufficient. That element is decisive upon the subject of

jurisdiction." See also *Tennessee* v. *Davis*, 100 U. S., p. 270, and *Union Pacific Railway* v. *Harris*, 158 U. S., 327–8.

Respectfully submitted,

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Plaintiff in Error.

IN THE

upreme Court of the United States.

OCTOBER TERM, 1899.

No. 303.

THE SOUTHERN RAILWAY COMPANY,
PLAINTIFF IN ERROR.
vs.
THE POSTAL TELEGRAPH-CABLE COMPANY,
DEFENDANT IN ERROR.

MEMORANDUM WITH APPELLANT'S BRIEF RESISTING MOTION TO VACATE OR MODIFY SUPERSEDEAS.

ge 7 of Appellant's above mentioned brief contains the wing statement:

The record from the Circuit Court of Appeals reached the k's office of this court Saturday, May 20th, 1899, and has not en printed, but the necessary fees were paid May 22, 1899, and ause then docketed as No. 832, October Term, 1898. It now ls as No. 303, October Term, 1899."

ne record referred to in this statement was the only one in existence, to wit: the original transcript furnished by clerk of the Circuit Court of Appeals, partly printed and ly type-written. To our surprise, on Friday, October 6th, after our brief was printed and in the hands of opposing sel, we received, from the clerk of this court, a copy of the rd as printed in and for this court.

order to harmonize the references in our brief and to er them readily available, in connection with the record rinted for this court, it is only necessary to say that the s referred to are identical with the marginal pages in the rd as printed for this court.

ROBERT STILES,
ADDISON L. HOLLADAY,
Counsel for Southern Railway Company.